STATE OF MICHIGAN
IN THE SUPREME COURT

MARY A. DONOHO

Plaintiff-Appellee,

v

WAL-MART STORES, INC. and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Appellants.

SUPREME COURT DOCKET NO 127537
COURT OF APPEALS NO. 256525
WCAC DOCKET NO. 03-0235

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANTS, WAL-MART STORES INC AND INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

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I. THE ISSUE PRESENTED IS ONE OF GREAT SIGNIFICANCE TO WORKERS' COMPENSATION LAW AND PRACTICE IN THE STATE OF MICHIGAN

This Court's Order permits the parties to offer oral argument on the question of whether leave should be granted. Should the Court be questioning the importance of this issue, it should be assured that the question is one of great significance to workers' compensation law and practice.

Indeed, there are two major components of workers' compensation benefits. The claimant, unable to work and earn to the same extent as before injury, receives wage loss benefits. The claimant also receives medical benefits, either as reimbursement to the employee for the cost of medical care, or by payment directly to unpaid medical providers. In some cases, a claimant might seek medical benefits only. In other words, a claimant may have medical treatment and associated cost, sometimes significant, but with continuing ability to work and little or no wage loss. The question of attorney fees payable for recovery of these medical benefits looms large for claimants, employers, insurers, and medical providers. This is, very simply, a question of major significance for workers' compensation law.

The question posed by this case is whether a claimant's attorney, who has recovered medical benefits for payment directly to a provider, is entitled to an attorney fee from the employer, over and above the full amount of medical costs owing and payable to the provider. The answer to that question has been hotly debated in the Workers' Compensation Appellate Commission in recent years. Some Commissioners have opined that the Act's language concerning attorney fees allows the Magistrate to assess attorney fees against the employer, over and above the medical benefit recovery. Others say that the statutory language is clear and unambiguous. The attorney fee is to be taken from the monies owing as benefits to the unpaid medical provider, or from those owing to the employee who has already paid the medical expense. In fact, the fee is to be prorated between them, according to their respective recoveries. Defendant contends that the latter proposition is the correct one.

Whatever the answer, the Court must recognize that this is an extremely important question for workers' compensation law and practice in Michigan. Workers' Compensation Appellate Commissioners have asked this Court, at least in one decision, to address and decide the matter. At the very least, this Court should grant leave to appeal to resolve this important question, once and for all.

II. SECTION 315(1) DOES NOT, BY ITS PLAIN LANGUAGE, AUTHORIZE AN EXTRA ATTORNEY FEE TO BE LEVIED AGAINST THE EMPLOYER. RATHER, IT CLEARLY OBLIGATES THE MEDICAL PROVIDER WHOSE BILL IS BEING PAID, NOT THE EMPLOYER, TO PAY ANY ATTORNEY FEE.

No one involved in this case disagrees with this primary proposition -- the Court should apply statutory language as it is plainly written and understood. Additionally, Plaintiff cannot dispute that any award of attorney fees against the employer is fully dependent upon the statutory language.

The question of attorney's fees in this case is controlled by §315(1) of the Workers' Disability Compensation Act (MCL 418.315(1)). Without authority of statute or administrative rule, the Magistrate may not award attorney fees as an element of costs or damages. (See Appellant's Application for Leave to Appeal, p 3) The language of the statute is the beginning and end of the analysis, if it is plainly understood. If the statutory language does not authorize an extra award of attorney fees against the employer for recovery of unpaid medical expenses, the Magistrate may not make such an award.

The language of §315(1) does not authorize an award of attorney fees against the employer. Instead, its unambiguous language provides only for a proration of attorney fees between the claimant and the medical provider, depending upon which one is receiving the money. In 2000, Workers' Compensation Appellate Commissioner Leslie carefully examined and explained the meaning of §315(1), reaching a conclusion that it means exactly what it says – the attorney fee is to be prorated between the two potential recipients of the benefits, the employee who paid and expects reimbursement, and the unpaid medical provider still looking to be paid.

Commissioner Leslie's Opinion is attached to Defendant's Application for Leave to Appeal as Exhibit C. He says:

> The relevant portion of Section 315(1) reads:
>
> > If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the hearing referee or worker's compensation magistrate, as applicable. The hearing referee or worker's compensation magistrate, as applicable, may prorate attorney fees at the contingent fee rate paid by the employee.
>
> I submit that defendant in this case is perfectly correct when it argues that the proration of the fees is between the employee and the provider of services and does not impose an additional obligation on the employer. The last sentence which permits the proration of attorney fees relates to the next to last sentence. That sentence states that reimbursement for medical expenses is to be made to the employee or to the party to whom the unpaid expenses may be owing. In no way does this language, reasonably interpreted, create an obligation on the part of the employer to pay fees over and above the obligation to pay the medical benefit. It clearly provides for a division of the fee based on the interests of those who recover. To the extent that the employee paid for medical expenses he or she owes the fee. To the extent that medical providers are paid directly, they owe the fee.
>
> Although there may be valid reasons for the legislature to impose fees on the employer, I cannot see in the wording of Section 315(1) that they did so. I am confirmed in this view by reviewing the history of Section 315(1).
>
> Prior to May 15, 1963, the last portion of this section read:
>
> > If the employer shall fail, neglect or refuse so to do [pay medical benefits specified earlier in the section] *such employee* shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the Commission. [Emphasis added.]
>
> This language only allowed for payment of the reasonable medical expense to the employee. Even in situations where the medical bill was, as yet, unpaid, the provider could not be reimbursed directly. In response, in 1963 the Legislature amended this section to provide for direct payment to medical providers. The new language read:

If the employer shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expense paid by him, *or payment may be made in behalf of such employee to persons to whom such unpaid expenses may be owing*, by an award of the commission. *The commission may prorate attorney fees in such cases at the contingent fee rate paid by such employee and it may also prorate such payments in the event of redemptions.* [Emphasis added.]

Thus, when the legislature amended the statute to allow for direct payment to medical providers, it added the provision which is currently under consideration. The only purpose for such an addition was to make sure that the provider, which could now be reimbursed directly, would pay its proportionate share of the attorney fee.

The error of interpreting Section 315(1) began with the Court of Appeals' decision in *Boyce v Grand Rapids Paving*, 117 Mich App 546 (1982). In that decision the court summarily rejected the claim that the medical provider, a beneficiary of the efforts of plaintiff's attorney in obtaining a recovery, should share in the obligation to pay attorney fees. The court did so without reference to the language of the statute. Compounding its error, the court immediately turned to the employer, and created an obligation under Section 315(1). Their strained reading required the employer, under certain circumstances, to pay an attorney fee over and above the amounts for reasonable and necessary medical treatment.

However, the decision in *Boyce* on the employer's liability for attorney fees is *obiter dictum* because the court did not decide the case on that issue. In denying that a separate fee could be assessed against the employer, *Boyce* looked to then Bureau Rule 14, which governed attorney fees. At the time of Mr. Boyce's injury, this rule did not allow any attorney fee on the recovery of medical expenses. Because unpaid medical was not included in the amounts for which a fee could be charged, Section 315(1), whatever its interpretation could not be the basis for requiring the employer to be responsible for any additional fee payment. Thus, the court's understanding of the meaning of the last sentence of this provision is without force of law.

As a result, the court in *Boyce* got the interpretation of the statute exactly backwards. The statute does, in fact, create on obligation on the part of the provider to pay the portion of the attorney fee reflected in the amount of the bill which was recovered on its behalf. Had the court interpreted this section properly, then there never would have been any need to consider the obligation of the employer for payment of a separate fee.

Six years after *Boyce* the court revisited the issue in *Watkins v Chrysler Corp*, 167 Mich App 122 (1988). At that time, Bureau Rule 14 had been modified to allow for an attorney fee on the payment of medical

> benefits. In reversing the Appeal Board's award of medical expenses, however, the court found that the medical expenses were not unpaid because the plaintiff's medical expenses had been paid by defendant's health and accident insurer. As a result, there was no extended discussion of *Boyce* or the statutory language.
>
> Unfortunately, *Boyce* has also been uncritically followed in cases solely involving provider fees. In *Zeeland Hospital v Vander Wal*, 134 Mich App 815 (1984), and *Duran v Sollitt Construction*, 135 Mich App 610 (1984), the court held that medical providers are not liable for an attorney fee in the absence of a specific agreement with the plaintiff's attorney to do so. As in *Boyce*, neither of these cases considered the specific language of Section 315(1) or its history. Had they done so, presumably they would have come to the correct conclusion that the legislature has imposed such a fee on those who receive the benefit of recovery.
>
> I concur with the result reached by my colleagues because of the Court of Appeals' and Commission's longstanding and consistent, albeit erroneous, interpretation of Section 315(1) on the question of employer-attorney fees. I believe that this issue should be reconsidered by the Court of Appeals or Supreme Court to interpret this section of the Act commensurate with its plain meaning. Section 315(1) imposes liability for a fee on plaintiff and the medical providers and not the employer. [Footnotes omitted]

For a contrary view, see Commissioner Glaser's concurring opinion in *Beattie v Wells Aluminum Corp* 2005 ACO No. 157, pp 16-18 (copy attached as Exhibit A). After citing the language of §315(1), Commissioner Glaser says:

> The last sentence must be read in conjunction with the previous one. In doing so, it becomes clear that the prorated attorney fee referred to should be paid by the employer/carrier and not the health care provider. The health care provider is not guilty of any breach of duty, and in fact would find itself in a position of having provided medical care in good faith and having to accept a discounted payment in addition to the limitations set by the Cost Containment Rules.

What is exceptionally inappropriate, as a matter of statutory interpretation, about Commissioner Glaser's Opinion is her sudden departure from the language to say something other than what it plainly means. She does so on account of her stated judgment that medical providers should not be made to

discount their recovery. But nothing in the statute leads to that conclusion. In fact, accepting her analysis that the last sentence refers to the preceding sentence, the obvious conclusion is opposite of hers.

Commissioner Leslie explained it well. The Legislature amended the statute in 1963, adding that the employee may recover not only the reasonable medical expense he or she may have paid, but that payment may be ordered, ". . . in behalf of such employee to persons to whom such unpaid expenses may be owing, ..." Having amended the statute to allow direct payment to medical providers, the Legislature added the provision for proration of attorney fees. As Commissioner Leslie says, "The only purpose for such an addition was to make sure that the provider, which could now be reimbursed directly, would pay its proportionate share of the attorney fee."

Where some, like Commissioner Glaser, have offered a strained reading of the statutory language, they are seemingly concerned that the Workers' Compensation Act should not reduce the health care provider's recovery for services they have already provided. That public policy concern will not justify a twisted reading of the statutory language. There is no reason why the Legislature could not require the medical provider to absorb the fee, just because that reduces the provider's recovery. The Legislature has already successfully limited medical benefit cost recovery by the cost containment provisions of the Act (§315(2)). That section permits the Bureau of Workers' Compensation to establish, by rule, maximum charges for various medical services. It goes on to state:

> . . . A health facility or health care provider shall be paid either its usual and customary charge for the treatment or attendance, service, devices, apparatus, or medicine, or the maximum charge established under the rules, whichever is less.

In other words, the Legislature has stepped in to limit costs recoverable by medical providers in this way. There is no reason to say that the Legislature has not, as well, limited their recovery by the value of attorney services expended to secure the payment.

The Legislature has allowed for the Cost Containment Rules, which limit the health care provider's recovery for medical services. The Legislature has done so to promote the purposes of the Act. There is no reason to assume, then, that the Legislature might not similarly require medical providers to bear the expense of attorney services which have benefited them. Commissioner Glaser's concern over reduced payments to health care providers is unjustified and will not support her strained reading of the plain, unambiguous language of the statutory provision.

In summary, the last sentence of §315(1) permits the Magistrate to "prorate" attorney fees; that is, to apportion them among more than one party. Multiple parties are referenced in the preceding sentence. They are the employee who is recovering medical costs he or she has already paid, or the medical provider who has not yet been paid for his or her services. The statutory language, particularly the word "prorate," cannot possibly support an extra award of attorney fees against the employer. Nothing in the statutory language leads to that conclusion. It says exactly the opposite.

RELIEF REQUESTED

For all of the foregoing reasons and authorities, Defendants-Appellants Wal-Mart Stores Inc. and Insurance Company of the State of Pennsylvania, respectfully request that this Court grant leave to appeal, and that upon leave granted it reverse the decision of the Workers' Compensation Appellate Commission and the Magistrate, for the reason that they should not have awarded attorney fees to be paid by the employer above and beyond the awarded medical benefits.

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